IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION.

WRIT PETITION No. 1534 of 2006.

Sun Pharmaceutical Industries
Limited. **..Petitioner.**

Vs.

The Union of India & Ors. **..Respondents.**

Mr Prakash Shah i/b P.D.S. Legal for the Petitioner.

Mr R.V. Desai, Senior Advocate with H.V.Mehta for the Respondents.

CORAM:DR.S. RADHAKRISHNAN
AND V.C. DAGA,JJ.
DATED:23rd APRIL, 2007.

ORDER

1. Heard.

2. Perused petition.

3. The petitioner has filed this petition under Article 226 of the Constitution of India against the order dated 20th April, 2006 passed by the Settlement Commission, Customs and Central Excise, Mumbai (respondent No.3) to the extent the petitioner is directed to pay further duty of Rs. 84,76,680/-with interest thereon at the rate of 10% per annum and a penalty in the sum of Rs. 10,60,000.00.

THE FACTUAL MATRIX

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4. The factual matrix reveals that the petitioner is a company under Companies Act, 1956 and is a successor of one M/s. Pradeep Drug Company Ltd. (P.D.C.L.). The reference to the petitioner herein willmean and include reference to the P.D.C.L. or the petitioner or both. The P.D.C.L.- company, which has since merged with the petitioner company, was served with show cause notices under the provisions of Sections 28(1), 114-A and 28-AB of the Customs Act, 1962 ("the Act" for short) for violation of Sections 58,59,68,71 and 72 of the Act and called upon to show cause as to why a duty in the sum of Rs. 84,76,688/- with interest thereon together with penalty of Rs. 10,60,000/- should not be demanded from it.

5. The show cause notices were received by the petitioner-company. The show cause notices are based on the allegations that while checking the "Input output Ratio",the Revenue Authorities discovered that there was a systematic; meticulous and wilful evasion of duty by the petitioner-company. According

to the Revenue, the petitioner company had inflated the quantity of raw material required for production of the finished products such as Erythromycin; Raxythromycin and Erythromycin Azithromycin. That after utilising the actual quantity of raw materials and final products, the remaining quantity was utilized in the account of the petitioner company under the pretext of job work done by the petitioner-company. It is further alleged that having taken advantage of the so called Job Work System, the petitioner had started clearing the in-bound materials, without payment of customs duty for the manufacture of the finished products. It is also alleged that the petitioner company had fraudulently fabricated and created bogus records with regard to the mother liquor i.e. "the mixture of spent solvents". According to the Revenue, the petitioner company has admitted the evasion of duty and the part played by it. It is in these circumstances that the show cause notices came to be issued to the petitioner-company along with others.

6. After receipt of the aforesaid show cause notices, the petitioner; instead of replying the show cause notices; directly approached the Settlement Commission at Chennai; on 25.11.2003 by filing an application under Section 127B of the Act.

7. On being noticed, respondent no.2, the Commissioner of Customs and Central Excise, Chennai III, filed counter-affidavit dated 3rd January, 2004 opposing application for settlement.

8. The above application, at the request of the petitioner, came to be transferred to the Respondent no.3,the Settlement Commission Customs and Central Excise, Additional Bench, Mumbai, by an order dated 23rd March, 2004 passed by the Chairman of the Settlement Commission, Principle Bench,New Delhi.

9. In view of the aforesaid order of transfer, petitioner appears to have filed fresh application dated 28th June, 2004 before the respondent No.3. The petitioner, in the

application, expressed it's willingness to settle the dispute on payment of Rs.67,40,290.00 as the additional amount of duty disclosed.

10. The respondent No.2 filed submissions dated 3rd and 31st August, 2004 before the respondent No.3. The application of the petitioner came up for admission on 31st August, 2004. The petitioner, at the hearing, admitted duty liability in the sum of Rs. 67,40,290.00 as against demand of Rs.1,71,91,550/- made in the show cause notices.

11. The Settlement Commission by it's interim order dated 31.8.2004, issued on 30.9.2004, allowed the petitioner to proceed under Section 127C(1) of the Act with direction to pay admitted duty liability of Rs. 67,40,290/- within 30 days of the receipt of order dated 31st August, 2004. The petitioner accordingly paid the said sum of Rs.67,40,200.00.

12. The respondent No.2,thereafter, filed a Writ Petition No.2464 of 2005 before the Madras High Court challenging the legality and validity of the said interim order dated 31st August, 2004, which came to be dismissed by the learned Single Judge holding that the Madras High Court had no territorial jurisdiction to entertain and try the writ petition since the order was passed by the Settlement Commission, Mumbai.

13. In the appeal filed by the Revenue dismissal order came to be set aside. The said writ petition was restored and remanded to the learned Single Judge for hearing on merits; observing as under:-

> "In the present case, the appellant has alleged that the entire occurrence of the offence was committed within the jurisdiction of the Settlement Commission, Additional Bench, Chennai and out of 13 applicants, 8 applicants are working in the fifth respondent's factory at Sathamai Village, within the jurisdiction of the Settlement Commission, Chennai and the show cause notice, which was the basis for filing the application, was also issued at Chennai. The private bonded warehouse,from where the respondents are alleged to have acquired the raw materials without payment of duty, is also located at Maduranthagam. The

surprise investigation, the recovery of incriminating documents and records have also taken place within the jurisdiction of this Court. All the other events spelt out in Annexure-A which form the grounds to the allegations contained in the show cause notice, would show that they took place within the jurisdiction of this Court."

(Emphasis supplied)

14. The aforesaid judgment has been accepted by the petitioner. The writ petition remanded by the learned Division Bench of Madras High Court is still pending for admission before the learned Single Judge.

15. During the pendency of the aforesaid petition, the respondent no.3-Settlement Commission, Mumbai passed final order dated 28th April, 2006.

16. The Commission settled the case of the petitioner for Rs.1,52,16,978.00. and directed the petitioner to pay the remaining amount of Rs. 84,76,680/- with interest thereon at the rate of 10% per annum from 28.7.2001 together with penalty of Rs. 10,60,000/- within 30 days from the date of

receipt of the order. The respondent No.3 has also granted immunity to the petitioner from prosecution alongwith others.

17. The petitioner, in this petition, has prayed for setting aside order dated 28th April, 2006 to the extent it requires petitioner to pay duty in excess of quantity of Rs. 5,103.90 kgs of ET and interest @ 10% per annum together with penalty of Rs.10,60,000/- on the various grounds raised in the petition.

18. When this petition, for the first time came up for admission before this Court, the counsel for the petitioner was put on notice that this Court may not consider it appropriate to exercise territorial jurisdiction in the matter. The learned counsel, thus, was called upon to address this Court on the question, whether it would be appropriate on the part of this Court to exercise writ jurisdiction in the matter, and as to why the petitioner should not be relegated to the jurisdiction of the Madras

High Court. That is how, the petition was heard on preliminary issue indicated herein.

SUBMISSIONS
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19. The learned counsel for the petitioner Mr Shah urged that since the respondent no.3 (Settlement Commissioner), who is located at Mumbai, within the jurisdiction of this Court; this Court has a territorial jurisdiction to entertain and try this petition. He placed reliance on the (unreported) judgment of Division Bench of this Court, in the case of **The Commissioner of Customs,Trichy No.1, Trichirappalli Vs. Standard Industries Ltd. Bombay (Customs Application No. 3 of 2000 decided on 15th February, 2007,** to which one of us (Daga,J) is a party.

20. Per contra, Mr Desai, learned Senior Counsel, appearing for the Revenue urged that the writ petition bearing No.2464/2005 filed against the Interim Order passed by the Respondent No.3(Settlement Commissioner), who is located at Mumbai,was filed by the respondent no.2 in the High Court at Madras,

which was originally dismissed by the learned Single Judge holding it to be not maintainable before it. However, the Division Bench of the said Court has set aside the said order of the learned Single Judge in appeal filed by the Commissioner of Central Excise, Pondicherry against Sun Pharmaceuticals Ind. Ltd.,(present petitioner), reported in **2006 (202) E.L.T.233(Mad.)**; holding that the Madras High Court has jurisdiction to entertain and try writ petition filed against the order of the respondent no.3. The said judgment has been accepted by the petitioner. As such, Mr Desai submits that the petitioner should be directed to approach the Madras High Court.

21. Mr Desai further submits that considering the entire occurrence of the offence committed, the intrinsic cause of action is within the jurisdiction of the Madras High Court. He has also emphasized that the show cause notice was issued by the respondent no.2, who is located at Chennai. The first application before the Settlement

Commissioner was filed at Chennai, though, it was transferred to the respondent no.3 at Mumbai by the subsequent order. He further submits that the petitioner has it's office within the jurisdiction of the Madras High Court wherein entire record pertaining to the case is available. As such, it would be more convenient for both the parties to fight the present litigation before the Madras High Court.

22. Mr Desai placed reliance on the judgment of the Delhi High Court in the case of **West Coast Ingots (P) Ltd. versus Commissioner of C.Ex.,New Delhi, 2007 (209) E.L.T.343(Del.)**, contending the facts involved in the said reported judgment are almost identical with the case on hand.

23. Mr Desai also placed reliance on the paras 27 and 30 of the judgment of the Apex Court in the case of **Kusum Ingots (cited supra)** in support of his submission.

CONSIDERATION
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24. Having heard the rival parties on the issue, it is not in dispute that the factory of the petitioner is located within the jurisdiction of the Madras High Court. It is also not in dispute that the show cause notices were issued by the respondent no.2, who is located at Chennai. It is also not in dispute that, initially, the application for settlement was filed before the Settlement Commission at Chennai, and, subsequently, got it transferred to the respondent No.3 at Mumbai. Acts constituting the foundation of the show cause notices were committed by the petitioner within the jurisdiction of the Madras High Court. Thus, the intrinsic and substantial cause of action is within the jurisdiction of the Madras High Court.

25. Mr Desai rightly relied upon the judgment of the Delhi High Court in the case of **West Coast Ingots (P) Ltd.** (supra); wherein the petitioners had filed settlement applications before the Settlement Commission

at Mumbai, for settlement of their respective cases in respect of show cause notices dated 1-10-2004 and 30-7-2004 issued to them by the Commissioner of Central Excise Goa in respect of the supplies made by the petitioners of M.S. Ingots, to Goa Ispat Ltd. located in the State of Goa, by evading the payment of excise duty. The settlement applications, as stated were, initially, filed before the Additional Bench of the Settlement Commission at Mumbai; and admitted duty liability was deposited with it. Later on the proceedings were transferred to the Principal Bench of the Settlement Commission at Delhi. The settlement applications were disposed of by the final orders passed by the Principal Bench of the Settlement Commission located at Delhi. The said orders were sought to be impugned by filing writ petitions before the High Court of Delhi; wherein the question came up for consideration, whether it would be appropriate for the said High Court to exercise territorial jurisdiction in the matter.

26. It was sought to be argued on behalf of the petitioners, to persuade the Delhi High Court to exercise it's writ jurisdiction, that the principal Bench of the Settlement Commission, who had passed orders, was located at Delhi i.e. within the territorial jurisdiction of the said High Court, as such it had a jurisdiction to entertain and try the writ petition; notwithstanding the petitioners themselves were located in the State of Goa and show cause notices were issued by the Commission or of Customs having its office at Goa.

27. Dealing with the aforesaid contention, the High Court at Delhi relying on the para 27 of judgment of **Kusum Ingots & Alloys Ltd versus Union of India 2004 (168) ELT 3 (SC)** expressed it's inability to agree with the submissions made by the petitioners and declined to entertain writ petitions. All the petitions were dismissed without prejudice to the rights of the petitioners to approach the appropriate Court with the following observations:-

"We are also unable to agree with the submission that the judgments of the Division Benches of this Court in Suraj Woolen Mills (supra) and Bombay Snuff Pvt.Ltd. (supra) would not apply only because they concern the filing of statutory appeals. The underlying principle recognized in both judgments is that the High Court should not exercise jurisdiction only because the Tribunal whose order is in appeal before it is located within its territorial jurisdiction. In Suraj Woolen Mills (supra), a reference was made to the two earlier decisions of the Division Benches of this Court in Seth Banarsi Dass Gupta v. CIT, (1978) 113 ITR 817 and Birla Cotton and Spinning Mills Ltd. V CIT, Rajasthan, (1980) 123 ITR 354 where appeals had been filed against the orders of the Income Tax Appellate Tribunal at Delhi although the assessees resided and carried on business outside Delhi. In both those cases this Court declined to exercise jurisdiction. In Bombay Snuff Pvt. Ltd. (supra), a Division Bench of this Court relied upon another judgment of the Division Bench in Commissioner of Central Excise v. Technological Institute of Textile, 1998 (47) DRJ 667 (DB) to the same effect. We see no reason why this principle should not be applied to decline to entertain a writ petition under Article 226."

"Turning to Vijay Fertilizers Pvt.Ltd. (supra) the following observations made after taking into account the judgment in Kusum Ingots, may be usefully noticed.

"On a reading of Article 226(1) of the Constitution it will be abundantly clear that without the next following provision, a High Court may not have been empowered to issue a writ or order against a party which is not located within the ordinary

territorial limits of that High Court. The power to issue writs against any person or Authority or Government even beyond the territorial jurisdiction of any High Court is no longer debatable. The rider or pre-requisite to the exercise of such power is that the cause of action must arise within the territories of that particular High Court. It does not logically follow, however, that if the cause of action, wholly or in part,arises within the territories over which that High Court holds sway, it must exercise that power rather than directing the petitioner to seek his remedy in any other High Court which is better suited to exercise jurisdiction for the reason that the predominant, substantial or significant part of the cause of action arises in that Court. In other words, any High Court is justified in exercising powers under Article 226 either if the person, Authority or Government is located within its territories or if the substantial and a significant part of the cause of action has arisen within its territories. The rationale of Section 20 of the Code of Civil Procedure would,therefore, also apply to Article 226(2). A part of the cause of action would indubitably arise at the place where a person receives an adverse order, under the ordinary principles of law... Accordingly, since i am of the opinion that the substantial or significant part of the cause of action has arisen in Uttar Pradesh, merely because the final say is that of the Central Government, Article 226(2) does

not require this Court to exercise the extraordinary jurisdiction vested in it under Article 226 of the Constitution. (emphasis supplied)."

"Mr.Kaul referred to the judgment of this Court in Agri Trade India Services Pvt. Ltd. v. Union of India, 2006 (204) E.L.T.161 (Del.) where a challenge to a notification issued by the Director General of Foreign Trade ('DGFT') by way of a writ petition by a company located in Mumbai was entertained. However, as has been pointed out in the said judgment itself, a substantial portion of cause of action arose in Delhi since the notification under challenge was issued by the DGFT in Delhi and all representations were made to and considered by the authorities in Delhi. Therefore, the judgment in Agri Trade India Services Pvt.Ltd.(supra), cannot come to the assistance of the petitioners herein."

28. We fully concur with the above view.

29. The Division Bench of this Court also had an occasion to consider, more or less, similar issue in the case of **Standard Industries Ltd. (supra);** wherein this Court has observed as under:-

"Extending the aforesaid principle of law enunciated by the Apex Court that even if the authority is dealing with the case arising in the State could be deemed principal authority located in the State, though, factually, its office may be outside the State, such authority could be amenable to the jurisdiction of the High Court from where the original

> proceedings were initiated, it is, thus,clear that the High Court, whether or not original authority located, will have jurisdiction to deal with the matter."

30. In the view of the above, even if the respondent no.3 is physically located at Mumbai, however, since it is dealing with the case arising in the State of Tamil Nadu, it could be deemed to be located in that State amenable to the writ jurisdiction of the Madras High Court.

31. The above case was principally decided on the touchstone of doctrine of merger; wherein the order of the first Appellate Authority had merged in the order of the Tribunal. The logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by the inferior Court, Tribunal or Authority was subjected to a remedy available under law before superior forum; then the order of superior forum disposing of lis before it either way - whether decree or order under appeal set aside

or modified or simply confirmed, it is the decree or order of the superior court, Tribunal or Authority which is the final, binding and operative decree or order; wherein merges the decree or order passed by the Court, Tribunal or Authority below. Thus, invoking the doctrine of merger, the view was taken that the substantial cause of action giving rise to the proceedings was based on the order of the Tribunal located at Mumbai. The ultimate adverse order affecting the revenue was that of the Tribunal located at Mumbai. In this view of the matter, the observations were made observing that if two courts have jurisdiction, then it is for the suitor to choose forum. The issue involved in this petition was not involved in the above case.

32. In the case on hand, the doctrine of merger is not applicable. The order passed by the Authority below did not merge into the order of the Settlement Commission. The order of Settlement Commission can neither be said to be an order in appeal or revision. The

Settlement Commission is altogether a different special forum created under the Act for settlement of the disputes. If the settlement is not accepted by the parties then the original proceeding gets revived and reopened. In this view of the matter, the reliance placed by the learned counsel for the petitioner on the judgment of this Court in the case of **Standard Industries Ltd.**(supra) is mis-placed.

33. We must point out that the issue in this petition is not whether this Court lacks jurisdiction to entertain this writ petition. This Court certainly has a jurisdiction. The real question is whether this Court should entertain this petition only because a small part of cause of action arises within the jurisdiction of this Court. In other words, the issue is :

> "Whether this Court should decline to entertain this petition considering the doctrine of "forum conveniens" when the substantial and intrinsic cause of action has arisen within the jurisdiction of the Madras High Court?"

34. We are unable to persuade ourselves to exercise territorial jurisdiction in the matter. It may at once be noticed that the judgment in **Kusum Ingots and Alloys Ltd. (supra)** does not lay down that a High Court should invariably exercise jurisdiction when an order, challenged before it, is passed by an authority or Tribunal located within its territorial jurisdiction. The following observations in the said judgment would bear this out:

> "27. When an order, however, is passed by a Court or Tribunal or an executive authority whether under provisions of a statute or otherwise, a part of cause of action arises at that place. Even in a given case, when the original authority is constituted at one place and the appellate authority is constituted at another, a writ petition would be maintainable in the High Court within whose jurisdiction it is situate having regard to the fact that the order of the appellate authority is also required to be set aside and as the order of original authority merges with that of the appellate authority."

> "30. We must, however, remind ourselves that even if a small part of cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merit. In appropriate

> cases,the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum conveniens."

35. In other words, the above judgment in **Kusum Ingots and Alloys Ltd.,** leaves it to the High Court to decide, on the facts of each case, whether it is required to exercise jurisdiction; if a part of the cause of action arises within its territorial jurisdiction.

36. On the above canvas of law, in exercise of our discretion, for all the above reasons, we decline to entertain this petition. However, the dismissal of the Writ Petition is without prejudice to the rights of the petitioner to approach appropriate forum to seek appropriate relief sought in the present petition. Petition is, accordingly, dismissed leaving all rival contentions open on merits with no order as to costs.

(V.C. DAGA,J) **(DR.S. RADHAKRISHNAN,J.)**